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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

LEMUEL SMITH,

Respondent.

PETITIONER'S REPLY BRIEF

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§ 70.10 Sentence of imprisonment for persistent felony offender.

1. Definition of persistent felony offender.

(a) A persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor; and

(ii) that the defendant was imprisoned under sentence for such conviction prior to the commission of the present felony; and

(iii) that the defendant was not pardoned on the ground of innocence.

(c) For the purpose of determining whether a person has two or more previous felony convictions, two or more convictions of crimes that were committed prior to the time the defendant was imprisoned under sentence for any of such convictions shall be deemed to be only one conviction.

2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04 or 70.06 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

§ 400.20 Procedure for determining whether defendant should be sentenced as a persistent felony offender.

1. Applicability. The provisions of this section govern the procedure that must be followed in order to impose the persistent felony offender sentence authorized by subdivision two of section 70.10 of the penal law. Such sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest.

2. Authorization for hearing. When information available to the court prior to sentencing indicates that the defendant is a persistent felony offender, and when, in the opinion of the court, the available information shows that a persistent felony offender sentence may be warranted, the court may order a hearing to determine (a) whether the defendant is in fact a persistent felony offender, and (b) if so, whether a persistent felony offender sentence should be imposed.

3. Order directing a hearing. An order directing a hearing to determine whether the defendant should be sentenced as a persistent felony offender must be filed with the clerk of the court and must specify a date for the hearing not less than twenty days from the date the order is filed. The court must annex to and file with the order a statement setting forth the following:

(a) The dates and places of the previous convictions which render the defendant a persistent felony offender as defined in subdivision one of section 70.10 of the penal law; and

(b) The factors in the defendant's background and prior criminal conduct which the court deems relevant for the purpose of sentencing the defendant as a persistent felony offender.

4. Notice of hearing. Upon receipt of the order and statement of the court, the clerk of the court must send a notice of hearing to the defendant, his counsel and the district attorney. Such notice must specify the time and place of the hearing and the fact that the purpose of the hearing is to determine whether or not the defendant should be sentenced as a persistent felony offender. Each notice required to be sent hereunder must be accompanied by a copy of the statement of the court.

5. Burden and standard of proof; evidence. Upon any hearing held pursuant to this section the burden of proof is upon the people. A finding that the defendant is a persistent felony offender, as defined in subdivision one of section 70.10 of the penal law, must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to the trial of the issue of guilt. Matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.

6. Constitutionality of prior convictions. A previous conviction in this or any other jurisdiction which was obtained in violation of the rights of the defendant under the applicable provisions of the Constitution of the United States may not be counted in determining whether the defendant is a persistent felony offender. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement of the court on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the manner provided herein constitutes a waiver on the part of the defendant of any allegation of unconstitutionality unless good cause be shown for such failure to make timely challenge.

7. Preliminary examination. When the defendant appears for the hearing the court must ask him whether he wishes to controvert any allegation made in the statement prepared by the court, and whether he wishes to present evidence on the issue of whether he is a persistent felony offender or on the question of his background and criminal conduct. If the defendant wishes to controvert any allegation in the statement of the court, he must specify the particular allegation or allegations he wishes to controvert. If he wishes to present evidence in his own behalf, he must specify the nature of such evidence. Uncontroverted allegations in the statement of the court are deemed evidence in the record.

8. Cases where further hearing is not required. Where the uncontroverted allegations in the statement of the court are sufficient to support a finding that the defendant is a persistent felony offender and the court is satisfied that (a) the uncontroverted allegations with respect to the defendant's background and the nature of his prior criminal conduct warrant sentencing the defendant as a persistent felony offender, and (b) the defendant either has no relevant evidence to present or the facts which could be established through the evidence offered by the defendant would not affect the

court's decision, the court may enter a finding that the defendant is a persistent felony offender and sentence him in accordance with the provisions of subdivision two of section 70.10 of the penal law.

9. Cases where further hearing is required. Where the defendant controverts an allegation in the statement of the court and the uncontroverted allegations in such statement are not sufficient to support a finding that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, or where the uncontroverted allegations with respect to the defendant's history and the nature of his prior criminal conduct do not warrant sentencing him as a persistent felony offender, or where the defendant has offered to present evidence to establish facts that would affect the court's decision on the question of whether a persistent felony offender sentence is warranted, the court may fix a date for a further hearing. Such hearing shall be before the court without a jury and either party may introduce evidence with respect to the controverted allegations or any other matter relevant to the issue of whether or not the defendant should be sentenced as a persistent felony offender. At the conclusion of the hearing the court must make a finding as to whether or not the defendant is a persistent felony offender and, upon a finding that he is such, must then make such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted. If the court both finds that the defendant is a persistent felony offender and is of the opinion that a persistent felony offender sentence is warranted, it may sentence the defendant in accordance with the provisions of subdivision two of section 70.10 of the penal law.

10. Termination of hearing. At any time during the pendency of a hearing pursuant to this section, the court may, in its discretion, terminate the hearing without making any finding. In such case, unless the court recommences the proceedings and makes the necessary findings, the defendant may not be sentenced as a persistent felony offender.

§ 450.10 Appeal by defendant to intermediate appellate court; in what cases authorized as of right.

An appeal to an intermediate appellate court may be taken as of right by the defendant from the following judgment, sentence and order of a criminal court:

1. A judgment other than one including a sentence of death;

2. A sentence other than one of death, as prescribed in subdivision one of section 450.30;

3. An order, entered pursuant to section 440.40, setting aside a sentence other than one of death, upon motion of the People.

PETITIONER'S REPLY

The New York statute under consideration (PL §125.27) is still in effect, unamended since Lemuel Smith was charged.[1] To argue, as the defendant does, that that statute is not in effect because the Court of Appeals in the case under review held that it violates the federal constitution is grossly misleading. New York does have a mandatory death penalty statute, by

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[1] The New York statute was amended in 1973 to not only make the penalty mandatory but also to severly limit the circumstances in which the penalty could be imposed. Prior to that a defendant could intend to kill any person and if he accidentally killed a police officer, face the death penalty. The statute also permitted imposition of the death penalty if the defendant acted recklessly with depraved indifference or the victim was a peace officer, a category significantly larger than that of police officer.

legislative enactment[2], and if this Court determines that that statute complies with federal constitutional mandates, an enforceable death penalty statute.

The defendant's contention that neither this Court nor the Governor of New York believes that New York has a death penalty

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[2] The Court of Appeals has never ruled on the issue of the constitutionality of the subdivision which mandates the death penalty for the intentional murder of a police officer in the performance of his duties. While the Court in dictum People v. Davis, 43 NY 2d 17, 400 NYS 2d 735, 371 NE 2d 456 (1977) clearly indicated its belief that that subdivision did not pass constitutional muster and the case is generally cited for that proposition, the court did not reach the issue, stating, "Accordingly, as to defendant Davis we conclude on nonconstitutional grounds that his guilt of murder in the first degree has not been established and thus do not reach the constitutional issue as to him". It was only as to the other subdivision under consideration, intentional murder of a correction officer in the performance of his duties, that the finding of unconstitutionality under the federal constitution applied.

statute is untenable. This Court's reference to the various death penalty statutes in the case cited by defendant, Enmund v. Florida, 458 US 782, 73 LEd 2d 1140, 102 SCt 3368 (1982), was in relation to the application of the death penalty to "general" homicides. The subsequent reference to the New York statute in Marshall v. Lonberger, ____US____, 74 LEd 2d 646, 103 SCt 843 (1984) as "a capital punishment statut(e) limited to precise categories of 'aggravated' murder" belies the defendant's contention (Stevens, J. dissenting ftnte 8).

In recent years, despite the Governor's stated opposition to the death penalty, the Legislature has attempted to reinstate the death penalty for a broad category of "general" murders. Each attempt has met with success by a wide margin but not by a margin wide enough to override

the vetos by the governors in question. It is to the application of the death penalty for "general" homicides which the governors referred.

Contrary to the defendant's contention, this Court has never intimated that a possible "lifer" exception was based upon the assumption that the life sentence was not subject to parole. The Louisiana statute provided for parole on a life sentence and it was in reference to that statute that this Court indicated that an exception might exist which would permit a mandatory death penalty. (Roberts v. Louisiana, 428 US 325, 49 LEd 2d 974, 96 SCt 3001 (1976), ftntes 3, 9; Roberts v. Louisiana, 431 US 633, 52 LEd 2d 637, 97 SCt 1993 (1977), ftnte 5).

The defendant argues that the New York death penalty statute would apply alike to a defendant who "kill(s) an inmate in a prison fight" and one who "mastermind(s) a pri-

son breakout in which he kills several guards and civilians" and that both would receive a mandatory sentence of death. In fact, based upon the facts stated, the first would not and the second might not. For the penalty to be applicable, the defendant must, inter alia, act "with intent to cause the death of another person" and acting with that intent "caus(e) the death of such person" (PL §125.27). Based upon the meager facts argued by the defendant, it is clear that the person who killed another in a fight did not act with that intent. The other facts alleged indicate an intent to breakout but not an intent to kill. If there was no specific intent to kill the victims, the New York death penalty would not apply. The New York statute applies to an extremely narrow set of circumstances.

The defendant's argument that offenders serving life sentences come from disparate criminal backgrounds and should be treated differently for intentional murders committed while incarcerated is not sound. The Legislature has determined that certain criminals should be sentenced to life imprisonment under certain circumstances for their criminal activity and that determination is presumed valid (Gregg v. Georgia, 428 US 153, 49 LEd 2d 859, 96 SCt 2902 (1976); People v. Davis, supra). The check forger, referred to by the defendant, committed three separate and distinct felonies (PL §70.10) and then had a hearing[3] at which aggravating and mitigating circumstances were considered and which closely paralleled those in jurisdictions

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[3] Unless he waived it.

which have a discretionary death penalty, after which the sentencing judge determined that "the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision are warranted to best serve the public interest" (CPL §400.20). A defendant may appeal as of right from such sentence.[4] (CPL §450.10)

The mass torture murder defendant referred to by the defendant would be, by any civilized standard, a person for whom a humane death penalty would be insufficient punishment. It is not, however, possible to

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[4] It is unlikely that a "simple" check forger would be sentenced to life. But if he were and the sentence affirmed, he would not be subject to the death penalty unless he commiteed an intentional murder, a fact which would prove that the trial judge acted properly in imposing the life sentence.

tailor a law to a single individual and no legislature could be expected to enact a constitutional law to fit the circumstance. The legislature has attempted to enact a discretionary death penalty law which would apply in a broad category of "general" murders but the enlightened governors have exercised their powers of veto. The legislature has thus provided that such crimes be punished by a mandatory life sentence. Like all other prisoners serving a sentence of at least 15 years to life, that defendant faces a mandatory sentence of death if he commits an intentional murder while serving that sentence.

Once serving a sentence of 15 years to life all prisoners over 18 who are convicted of intentional unmitigated murder face a mandatory death sentence.[5]

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[5] See: Penal Law §125.27 for other factors.

The distinction is rational and comports with constitutional mandates. The legislative determination must be accurate and the potential sanction effective as the defendant Lemuel Smith is the only prisoner in the State of New York currently facing the death penalty.

The petition for a writ of certiorari to the New York Court of Appeals should be granted.

Respectfully submitted,

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